Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

October Term, 1994

ROBERT JOSEPH HAKEL,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

April Bennett Stone
Counsel of Record

F. Brittin Clayton III
Clayton and Stone, L.L.C.
2060 Broadway
Siena Square, Suite 460
Boulder, Colorado 80302
(303) 444-7722

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether an affidavit of a police officer, stating that in his experience and training individuals trafficking and distributing controlled substances habitually keep records and other written documents concerning the amount of cocaine which they sell and the prices paid, when considered with statements of the affiant that a defendant historically uses an alternative location to store contraband, and in the absence of any other nexus between the alternative location and the defendant's home, is sufficient probable cause to issue a warrant to search his home?

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THE PEOPLE OF THE STATE OF COLORADO,

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Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported as *People v. Hakel* at 870 P.2d. 1229 (Colo. 1994) and is included in the Appendix at App. A1-15. The opinion of the Colorado Court of Appeals is unreported and is also included in the Appendix at App. B16-28.

JURISDICTION

The judgment of the Colorado Supreme Court (App., *infra*, A2) was entered on April 11, 1994. By order dated July 5, 1994, Justice Ruth Bader Ginsberg extended the time within which to file a petition for a writ of certiorari to and including August 9, 1994.[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article II, §7 of the Colorado Constitution states:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as

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[1] On August 25, 1994, Petitioner filed a second request for enlargement of time, based on counsel's good faith, but incorrect, belief that the time had been extended until August 30, 1994 as originally requested.

near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

STATEMENT OF THE CASE

Petitioner Robert J. Hakel was charged with various counts of possession and intent to distribute cocaine in violation of Colorado law. Evidence seized in a search of Petitioner's private residence was used against him at trial. This search was conducted after police found cocaine in a motel room rented to someone other than Petitioner. Officer John Zen of the Grand Junction Police Department initially obtained a warrant authorizing him to conduct a search of Room 271 at the Best Value Inn in Grand Junction, Colorado. In the supporting affidavit, Zen stated he was familiar with Petitioner from an earlier investigation, that Petitioner always used a "safe house" to store contraband, and that it was Petitioner's custom to visit the safe house to retrieve cocaine before making a contact. (App., *infra*, D38.) Zen stated that police had observed Petitioner enter and leave Room 271 the previous evening and, based upon an ongoing investigation involving surveillance of Petitioner and others, the police expected to find cocaine, cash, paraphernalia, and documents reflecting the sale and purchase of cocaine inside the motel room. (App., *infra*, D39.)

Following a search of the motel room, police found cocaine hidden in the ceiling of the bathroom, but no paraphernalia, cash or documents. (App., *infra*, A5.) The police arrested Petitioner later that day as he approached the motel room. After Petitioner was taken into custody,

Zen obtained a search warrant for Petitioner's residence. In the supporting affidavit, Zen incorporated his earlier affidavit and added the following facts: (1) based upon his experience and training, individuals trafficking in cocaine habitually keep records and other written documents concerning cocaine sales; (2) that he had personal knowledge that Petitioner kept records of cocaine transactions; (3) based upon his training and experience that since no records were found in the motel room, probable cause existed to believe that such records would instead be found in Petitioner's home. (App., *infra*, D31-39.)

In executing this second warrant, police seized $40,000 in currency, but discovered no controlled substances, no drug paraphernalia, and no records of illegal transactions. (App., *infra*, A6-7.) Petitioner timely moved the District Court to suppress this evidence on the basis that his residence was searched without probable cause to believe contraband was located inside. The District Court denied Mr. Hakel's motion. Following a jury trial, Mr. Hakel was convicted of each count and sentenced to concurrent sixteen-year sentences. (App., *infra*, A7.)

On appeal, the Colorado Court of Appeals reversed Petitioner's convictions, concluding that the search of his home had indeed been conducted without probable cause. (App., *infra*, B21.) The court took note of both affidavits and determined they failed to establish any nexus between evidence of criminal conduct and Petitioner's home, and that the facts relied upon to issue the warrant "did not provide any indication that contraband, related paraphernalia, or records were likely to be located at [Mr. Hakel's] residence." (App., *infra*, B21.)

The People petitioned the Colorado Supreme Court for a writ of certiorari which was granted on June 7, 1993.[2] On March 14, 1994, in a 4 to 3 decision, the court concluded that "the link between suspected criminal activity and a specific location to be searched may be established by circumstantial evidence and proper inferences drawn therefrom"[3] and remanded the case with instructions to reinstate the convictions. (App., *infra*, A2.)

Justice Lohr dissented. He wrote that as a result of the information contained in the affidavit, "the police believed that records of Hakel's drug transactions were located *somewhere*. Nevertheless, even if that belief rose to the level of probable case, the belief that the records were located in *Hakel's* residence did not rise above the level of mere suspicion." (App., *infra*, A12.) Justice Lohr concluded that the "totality of the facts asserted in the affidavit did not imply that the records were more likely to be found at Hakel's residence than at any other location to which Hakel had access." (App., *infra*, A15.)

This timely petition for a writ of certiorari followed.

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[2] The People argued that the Court of Appeals misapplied the law because a magistrate is allowed to make reasonable inferences as to the nexus between contraband and a defendant's residence and that the decision of the Court of Appeals should be overturned to forestall detrimental effects on future police investigations.

[3] The court reached this conclusion even though it agreed that the affidavits "contained no statements that persons had observed cocaine, paraphernalia, or records of controlled substance transactions in Hakel's residence." (App., *infra*, A10.)

REASONS FOR GRANTING THE PETITIION

This case is significant because the decision of the State of Colorado is inconsistent with that of other state and federal courts. Further, this case establishes precedent that probable cause to search a location may be shown without a factual link, but instead by mere suspicion that simply because contraband is not discovered where it is reasonably thought to be, it is somewhere else.

The Fourth and Fourteenth Amendments to the United States Constitution and Article II, Section 7, of the Colorado Constitution protect persons against unreasonable searches and seizures by government agents. In order to comply with these constitutional protections, police must generally obtain a warrant based upon probable cause prior to conducting a search for incriminating evidence. U.S. Const. amend. IV. An affidavit supporting a search warrant establishes probable cause for the issuance of a warrant only if it alleges sufficient facts for a person of reasonable caution to believe that contraband or material evidence of criminal activity is located on the premises to be searched. *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *United States v. Harris*, 903 F.2d 770, 744 (10th Cir. 1990) (citing *Illinois v. Gates*)

This Court has made clear that "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime, but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). This court has also held that in the absence of any

facts linking contraband to a person's home, mere suspicion is not enough to establish probable cause to search his home. *Henry v. United States*, 361 U.S. 98, 101 (1959). The fact that someone is suspected of participating in criminal activity, without more, is not probable cause to believe that evidence will be found in their residence. *See e.g. United States v. Ramos*, 923 F.2d 1346 (9th Cir. 1991); *United States v. Savoca*, 761 F.2d 292 (6th Cir. 1985); *United States v. Lockett*, 674 F.2d 843 (11th Cir. 1982); *United States v. Freeman*, 685 F.2d 942 (5th Cir. 1982); *United States v. Green*, 634 F.2d 222 (5th Cir. 1981); *United States v. Charest*, 602 F.2d 1015 (1st Cir. 1979); *United States v. Cobb*, 432 F.2d 716 (4th Cir. 1970).

In making a probable cause determination, the task of the issuing magistrate is simply to reach a practical, common sense decision whether, "given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. at 238.

Since *Illinois v. Gates*, courts have struggled without consensus to define this notion of reasonableness and fair probability. For example, in *United States v. Ramos*, the affidavit supporting a search warrant recited that the defendant was observed in front of the residence in a van, that he drove the vehicle to another location, and that a box loaded by another was unloaded from the van. The court found no probable cause since the affidavit contained no facts making it likely that anything the officers sought was in the residence. Specifically, there were no allegations of anything being transported between the van and the apartment, or that anybody from the van

even entered the apartment. 923 F.2d at 1352. *See also United States v. Hendricks*, 743 F.2d 653, 654-56 (1984), *cert. denied*, 470 U.S. 1006 (1985) (warrant invalid where premised on box containing cocaine being on premises but no information giving rise to reasonable belief that the box, which was in possession of government when warrant was issued, would ever go to premises); *United States v. Freeman*, 685 F.2d at 946 (Facts must exist in affidavit to create nexus between house to be searched and evidence sought. No probable cause existed to search defendant's residence for drug business records where police had only observed defendant engaging in drug smuggling at other locations.)[4]

The United States District Court for the District of Colorado relied on a similar analysis in concluding that a warrant authorizing the search of a residence was invalid for lack of probable cause to believe contraband was located inside that residence. In *United States v. Barker*, 623 F. Supp. 823 (D. Colo. 1985), police sought authorization to search a residence based upon an affidavit that incorporated by reference affidavits filed in support of requests to search three other residences. *Id.* at 842. Each

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[4] *Contra, United States v. Pace*, 955 F.2d 270, 277 (5th Cir. 1992) (Warrant held sufficient based on affidavit stating that DEA agent observed full scale marijuana growing operation at farm of defendant's parents but no business records, along with agent's statement that individuals who cultivate marijuana routinely conceal contraband, proceeds of sales and records in their homes to prevent discovery by law enforcement.); *See United States v. Raborn*, 872 F.2d 589 (5th Cir. 1989); *United States v. Lamon*, 930 F.2d 1183 (7th Cir. 1991); *United States v. McNeese*, 901 F.2d 585 (7th Cir. 1990); *United States v. Reyes*, 798 F.2d 380 (10th Cir. 1986).

affidavit described an ongoing narcotics investigation in which defendant Barker was implicated, in part owing to wiretaps that disclosed the defendant participated in conversations related to illegal transactions. *Id.* The court acknowledged that these affidavits clearly supported a finding of probable cause to believe defendant Barker was involved in illegal narcotics transactions, but concluded they did not create probable cause to believe police would find contraband in a search of the defendant's home. *Id.* at 843. The court pointed out that the supporting affidavits nowhere recounted police observations of suspected contraband being moved into and out of the residence, and that

> [t]he only connection between the East 115th Avenue residence and the drug conspiracy charged in this indictment is the fact that two persons who were suspected of being members of that conspiracy lived at the residence. Essentially, the government is arguing that probable cause to believe [the defendants] were involved in the drug conspiracy is enough to establish probable cause to search their home. We believe the fourth amendment requires more. The facts in the affidavit may have raised a suspicion that drugs or documents related to drug transactions would be found at the [defendants'] residence. But, in the absence of any *facts*, suspicion is not enough to establish probable cause to search a person's home.

Id. at 844 (citing *Henry v. United States*, 361 U.S. at 101 (1959) (*emphasis in original*).

In *State v. Mische*, 448 N.W.2d 415 (N.D. 1989), the Supreme Court of North Dakota decided the same issue presented here, that is, whether

> substantial evidence of criminal activity by a defendant at a place other than his home is sufficient probable cause to issue a warrant to search the home of the defendant and, if not, whether an affidavit of a police officer stating that in his experience and training "individuals who routinely deal or sell controlled substances normally keep a supply on hand for sale and do maintain records or other documentation of their controlled substances" is sufficient, when considered with the evidence of criminal activity of the owner unrelated to his home, to issue a warrant to search that home. *Id.* at 415-6.[5]

The case arose when police observed an individual purchase a controlled substance from the defendant at his parents' home. Police conducted a search of that home pursuant to a warrant and discovered drug paraphernalia inside. *Id.* at 416. Shortly thereafter, police obtained a second warrant authorizing them to search the mobile home where the defendant resided. The affidavit in support of the request to search the defendant's home incorporated the affidavit filed in conjunction with the first warrant, described the drug paraphernalia discovered pursuant to that warrant, and stated that the applying officer's training and experience led him to believe that

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[5] *See also Sanders v. State*, 610 P.2d 247 (Okl. Cr. 1980) (Affidavit which stated that all transactions involving drug sales occurred near or in defendant's place of business, could not be used to infer that contraband was present in the business).

"individuals who regularly deal in controlled substances keep controlled substances, paraphernalia and documentation (which are readily disposable) at their residence." *Id.* The defendant was subsequently successful in moving to suppress the evidence seized in the search of his mobile home on the ground that the affidavit failed to establish anything more than mere suspicion that contraband was located inside. *Id.*

On appeal, the court acknowledged that while police had shown probable cause to search the home of the defendant's parents, neither affidavit provided sufficient information to support a search of the defendant's mobile home. *Id.* at 417. Recognizing that the specialized knowledge of police officers is often due substantial deference in determining whether probable cause exists, the court reasoned that the supporting affidavits nevertheless disclosed no actual knowledge regarding the defendant's activities inside his mobile home. *Id.* at 421. In fact, the court pointed out, the affidavit supporting the warrant to search the parents' home suggested that location, rather than the mobile home, was the defendant's center of operations. *Id.*

Only after finding drug paraphernalia during their first search did police attempt to connect the defendant's allegedly illegal activities with his own residence. At that point, the court concluded "the officers were on a 'fishing expedition' prohibited by the Fourth Amendment." *Id.* "Something additional," the court explained,

> and more objective than the facile conclusion that contraband is ordinarily kept in the home should be required to establish probable cause to search that home, particularly where, as here,

> it is apparent that the officers believed the contraband was in a particular place, [the parents' home], and that only after a search of that residence did not reveal the contraband did the officers rely upon their training and knowledge to justify the search of the [defendant's] residence.

Id. at 422.

The Colorado Supreme Court relied extensively on its earlier decision in *People v. Higbee*, 802 P.2d 1085 (Colo. 1990) to find probable cause existed to support the search of Petitioner's residence. *Higbee* involved a warrantless search premised on exigent circumstances. Relying on the statements of a confidential informant who observed what appeared to be an explosive device in the defendant's car, police established surveillance of the defendant's car and watched the defendant and others carry packages from his car into the apartment complex. *Id.* at 1087. Following defendant's arrest, police searched his car and found suspicious wiring and switches, but no explosives. *Id.* Concerned that explosives had been moved by the defendant and his companions from the car into the apartment complex, police initiated a search of the defendant's apartment. *Id.* Although, they failed to discover explosive materials, they did seize a quantity of controlled substances. *Id.* at 1087-88.

On review, the Colorado Supreme Court concluded the district court erred in granting the defendant's suppression motion because the record demonstrated that police did indeed have probable cause to believe they would find illegal explosives inside the defendant's apartment when they failed to discover any explosives

inside the defendant's car. *Id.* at 1089. Crucial to the court's decision was that during the half-hour prior to the defendant's arrest, police watched defendant and others carrying items from the car into the apartment complex:

> [w]hen the search of the car by police officers disclosed no explosive device, even though there was probable cause to believe that such a device had been located in the car, it gave rise to more than mere suspicion that the device had been moved to the apartment. Association of the defendant with the apartment combined with the observation of items being carried from the car to the apartment led to the reasonable conclusion that the alleged explosive device had been moved to the apartment.

Id.[6]

In Petitioner's case, the affidavits contain a litany of facts concerning Officer Zen's familiarity with Petitioner's past drug dealing behavior, his past history of keeping of business records, and his use of a safe house, or alternative location, for the purpose of storing contraband. Zen's affidavit states Petitioner was observed entering and leaving a motel room later found to contain a controlled substance, that there was reason to believe Petitioner was involved in narcotics trafficking, that there was reason to believe individuals involved in narcotics transactions maintained records of those transactions, that a 1984 investigation of Petitioner indicated he made

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[6] The search of Higbee's apartment was further justified on the emergency variation of exigent circumstances because of the explosive devices which were the object of the search. 802 P. 2d at 1090.

records of narcotics transactions in which he was involved, and that no records were discovered during the search of the motel room in which the controlled substance was found. (App., *infra*, D31-33.) There is no information that Petitioner ever stored documents, records, cash or paraphernalia in his home. Absent from both of the affidavits submitted by Zen is any information that police ever saw Petitioner moving anything between his home and the motel room. Further, in Zen's recitation of the conclusions his "training and experience" made possible, he did not state or imply that he believed Petitioner maintained records of illegal transactions in his home. Rather, the officer indicated only that, in his experience, individuals involved in narcotics trafficking tended to maintain records of their illegal activities and that Petitioner had done so previously. (App., *infra*, D32-33.) While this statement might lead to some degree of suspicion that such records were stored somewhere, it in no way created probable cause to believe they would be discovered in the Petitioner's home, the specific location the police sought authorization to search, consistent with the United States and Colorado Constitutions.

The irreconcilable inconsistencies of the decisions of cases cited herein, and the significant need for guidance on this issue, demonstrate a compelling reason why the Court should issue a writ of certiorari to review the judgment of the Colorado Supreme Court.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

April Bennett Stone
Counsel of Record

F. Brittin Clayton III
Clayton and Stone, L.L.C.
2060 Broadway
Siena Square, Suite 460
Boulder, Colorado 80302

Counsel for Petitioner

Dated: August 30, 1994

APPENDIX A

SUPREME COURT OF COLORADO
NO. 93SC103 March 14, 1994

THE PEOPLE OF THE STATE OF COLORADO, Petitioner,

v.

ROBERT JOSEPH HAKEL, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Gale A. Norton, Attorney General
Stephen K. ErkenBrack, Chief Deputy Attorney General
Timothy M. Tymkovich, Solicitor General
John Daniel Dailey, Deputy Attorney General
Robert Mark Russel, First Assistant Attorney General
Laurie A. Booras, Assistant Attorney General
Curt Kriksciun, Special Assistant Attorney General
Denver, Colorado

Attorneys for Respondent

David F. Vela, Colorado State Public Defender
April Bennett Stone, Special Deputy State Public Defender
F. Brittin Clayton III, Special Deputy State Public Defender
Boulder, Colorado

Attorneys for Respondent

JUSTICE KIRSHBAUM delivered the Opinion of the Court JUSTICE LOHR dissents, and JUSTICE ERICKSON and JUSTICE SCOTT join in the dissent.

In *People v. Hakel*, No. 90CA1966 (Colo. App. Nov. 17, 1992) (not selected for official publication), the court of appeals reversed judgments of conviction on three counts of possession of cocaine,[1] two counts of distribution of cocaine,[2] two counts of conspiracy to distribute cocaine,[3] possession of cocaine with intent to distribute,[4] possession of more than twenty-eight grams of cocaine with intent to distribute (a sentence enhancer),[5] and being a special offender (a sentence enhancer)[6] entered against the respondent, Robert Joseph Hakel. The court of appeals held that the trial court erred in denying Hakel's motion to suppress evidence seized at his residence pursuant to a search warrant. The court of appeals concluded that the affidavit submitted in support of the request for the issuance of the warrant did not establish probable cause to believe that evidence of the illicit transactions was located at Hakel's residence. Having granted certiorari to review the propriety of the court of appeals' conclusion, we reverse and remand the case with directions to reinstate the judgments of conviction.

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[1] §§ 12-22-310(1)(a)(V), 5 C.R.S. (1989 Supp.) & 18-18-105(1)(a), 8B C.R.S. (1989 Supp.).

[2] §§ 12-22-310(1)(a)(V), 5 C.R.S. (1989 Supp.) & 18-18-105(1)(a), 8B C.R.S. (1989 Supp.).

[3] §§ 12-22-310(1)(a)(V), 5 C.R.S. (1989 Supp.); 18-2-201, 8B C.R.S. (1986); & 18-18-105(1)(a), 8B C.R.S. (1989 Supp.).

[4] §§ 12-22-310(1)(a)(V), 5 C.R.S. (1989 Supp.) & 18-18-105(1)(a), 8B C.R.S. (1989 Supp.).

[5] § 18-18-105(3), 8B C.R.S. (1989 Supp.).

[6] § 18-18-107, 8B C.R.S. (1986).

I

In the fall of 1989, several officers of the Mesa County Sheriff's Department and the Grand Junction Police Department monitored two controlled purchases of cocaine by a confidential informant. On September 27, 1989, the informant, equipped with a transmitting device, accompanied Zane Garner to the latter's house. When Garner stated that he would contact his source when he received $1,200, the informant gave Garner the money. Garner then made several telephone calls. During one conversation, Garner stated that he wanted to set up a pool game and told the person to whom he was speaking to bring the "Balabusca," a type of pool cue, to the usual place. The record contains evidence that drug traffickers often use code words to arrange transactions.

While the informant waited, Garner left his residence, drove to the parking lot of a nearby Loco Food Store, and entered a green van occupied by Hakel and another person. The three men drove to another store and returned to the Loco Food Store. Garner then returned to his residence and gave the confidential informant a plastic bag containing 24.62 grams of cocaine powder.

On October 11, 1989, the confidential informant again visited Garner's residence to purchase cocaine. Upon receiving $1,200 from the informant, Garner made a telephone call and told the person who answered the call to bring the "Balabusca" to the usual place. Hakel then drove to the Best Value Inn, entered room 271 of the motel, remained there for five to ten minutes, and drove to the Loco Food Store. Garner, who also had driven to the food store, got out of his vehicle, approached the

automobile occupied by Hakel, and leaned inside the car. Garner returned to his vehicle, drove back to his residence, and gave the confidential informant a plastic bag containing 25.09 grams of cocaine powder.

On October 12, 1989, police officers obtained a warrant to search room 271 of the Best Value Inn based upon an affidavit executed by Grand Junction Police Department Officer John Zen. The affidavit contained the following statements:

> 4. On October 11, 1989 Detective Bill Booth . . . and Detective Tim Grimsby . . . were surveilling 2150 College Place, number 22. Booth and Grimsby both indicated to me that approximately 8:05 p.m. they observed Robert Hakel to leave that residence. . . . [and] that they followed Hakel in his vehicle to the Best Value Inn located at 718 Horizon Drive. . . . Booth stated that he then observed Robert Hakel to go into room 271 of the Best Value Inn. . . . Approximately five minutes later Booth stated that Hakel left room 271. Detective Grimsby told me that he then followed Hakel from the Best Value Inn to the Loco Food Store. . . . Grimsby stated that he observed Hakel to meet with a person who Grimsby knew as Zane Garner. Grimsby stated that Garner walked up to the driver's window of Hakel's car, stayed there for approximately four minutes and then left. Grimsby stated that Hakel also left the area at that time and he followed Hakel back to [his] residence. . . . Grimsby observed Hakel to go into that residence.
>
> 5. In the latter part of 1984, I personally participated in a Federal Bureau of Investigation wiretap investigation in Mesa County, Colorado.

> Robert Hakel was the target of that wiretap. I know that as a result of that investigation Robert Hakel was indicted by a Federal Grand Jury for possession of cocaine and possession of cocaine with intent to distribute.
>
> 6. On October 11, 1989 I spoke with Max Marr who is . . . now retired. . . . I have personal knowledge that Marr was the lead investigator on the wiretap investigation targeting Robert Hakel in 1984. Marr stated to me that Hakel was convicted in 1985 of possession of cocaine and possession of cocaine with intent to distribute. . . . Max Marr further stated to me that during the investigation . . . it was revealed through surveillance that Robert Hakel used what is called a safe house to store his cocaine. The safe house was a condominium. . . . Marr further stated that on almost every occasion that they followed Hakel when he was doing a drug sale that he went to the safe house prior to making his contact to retrieve the cocaine. I also know through my involvement during that investigation that during the search of the condominium . . . that over one pound of cocaine was found in the ceiling. . . .

Upon executing the warrant, police officers found plastic bags containing several ounces of cocaine powder hidden in the bathroom ceiling. The officers did not find any scales, other paraphernalia, empty plastic bags, or records in the room.

Zen subsequently executed a second affidavit in support of a request for a warrant to search Hakel's residence. The affidavit incorporated his prior affidavit by

reference, a copy of which was attached thereto, and contained the following statements:

> 2. In the early morning hours of October 12, 1989 your Affiant and other members of the Mesa County Narcotics Enforcement Team executed a search warrant . . . on Room 271 at the Best Value Inn. . . . As a result of that search warrant, approximately 14 ounces of a white powdery substance which later was confirmed to be cocaine was removed. . . .
>
> 3. Based on the observations that were made and contained in the attached Affidavit, (Exhibit A), it is clear to your Affiant from his training and experience that Robert Hakel is substantially involved in the trafficking of cocaine. I also know through my training and experience that individuals trafficking and distributing controlled substances habitually keep records and other written documents concerning the amount of cocaine in which they sell and the prices paid for it. . . . Your affiant would state from his training and experience that since no records or paperwork having to do with the sale or transactions of cocaine [were] found in Room 271 where the cocaine was located and that during the prior wiretap investigation in 1984, your affiant has personal knowledge that Mr. Hakel kept records of his transactions in cocaine. There is probable cause to believe that such records and paperwork associated with the purchase and distribution of controlled substances, to wit: cocaine would be located at his residence. . . .

A warrant to search Hakel's residence was issued by a county court judge. Officers executing the warrant found

no cocaine, paraphernalia, or records of drug transactions, but did discover over $40,000 in cash.

Before trial, Hakel filed a motion to prohibit the prosecutor from offering the $40,000 cash into evidence. Hakel contended that the initial warrant to search room 271 of the Best Value Inn was not supported by probable cause, that the search of his residence had been conducted on the basis of information obtained from the initial unlawful search, and that the $40,000 cash seized from his residence must therefore be suppressed under the fruit of the poisonous tree doctrine. The trial court denied the motion. It concluded that Zen's initial affidavit, when considered in a common sense manner, established probable cause that evidence of criminal conduct existed in room 271 of the motel. It then rejected Hakel's fruit of the poisonous tree argument. Hakel was convicted of all of the ten counts charged and was sentenced to concurrent sixteen-year sentences on each substantive count.

On appeal, Hakel argued, *inter alia,* that the two affidavits submitted by Zen did not establish probable cause to search Hakel's residence. The court of appeals agreed with the argument, reversed the judgments of conviction and remanded the case for a new trial. The court held that the warrant authorizing the search of Hakel's residence was not supported by probable cause and that the admission into evidence of the $40,000 in cash seized during that search did not constitute harmless error.[7]

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[7] During oral argument the People suggested that the court of appeals improperly considered Hakel's argument that the

II

The Fourth and Fourteenth Amendments to the United States Constitution and Article II, Section 7, of the Colorado Constitution protect persons against unreasonable searches and seizures by government agents. Government officials are, with few exceptions, prohibited from searching private homes in the absence of a warrant issued by a judicial officer authorizing such search. *Hoffman v. People*, 780 P.2d 471, 474 (Colo. 1989); *People v. Thiret*, 685 P.2d 193, 200-01 (Colo. 1984). A warrant to search a residence may be issued only if the judicial officer determines from verified information submitted in support of the request for the warrant that probable cause exists to believe that evidence of criminal conduct will be discovered during the course of the search. *People v. Turcotte-Schaeffer*, 843 P.2d 658, 659-60 (Colo. 1993). The verified information must include sufficient facts to warrant a person of reasonable caution to believe that contraband or other evidence of criminal activity is located at

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two affidavits failed to establish probable cause to search his residence because at trial he argued only that the search of his residence was based on evidence obtained from an unconstitutional search of the motel. However, the People did not raise this argument before the court of appeals and did not assert it prior to oral argument in this court. While a broad reading of Hakel's suppression motion might support the argument that the issue of probable cause to search his residence had been raised, the trial court based its ruling concerning the search of the residence on the fruit of the poisonous tree doctrine and Hakel conceded at oral argument that the probable cause issue had not been asserted at trial. Because both parties chose to address the probable cause issue before the court of appeals, we elect to do so here.

the place to be searched. *Id.* at 660. *See United States v. Barker,* 623 F. Supp. 823, 843 (D. Colo. 1985).

Affidavits submitted in support of a request for the issuance of a search warrant should be interpreted in a common sense fashion, *Bartley v. People,* 817 P.2d 1029, 1033 (Colo. 1991), and the ultimate issue is whether, considering the totality of the circumstances, the affidavit establishes a fair probability that contraband or evidence of crime will be found. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). Probability, not certainty, is the touchstone of probable cause, *People v. Ball,* 639 P.2d 1078, 1082 (Colo. 1982), and deference should be given to the initial judicial determination regarding probable cause. *United States v. Schuster,* 775 F. Supp. 297, 307 (W.D. Wis. 1990). However, in recognition of the significance of a person's right to privacy in his or her residence, law enforcement officials should in all but the most compelling of circumstances obtain warrants prior to performing any search of a residence. *See People v. Taube,* 864 P.2d 123 (Colo. 1993); *People v. Hill,* 690 P.2d 856, 859 (Colo. 1984).

The court of appeals based its conclusion that Zen's two affidavits did not establish probable cause for issuance of a warrant to search Hakel's residence on the premise that the affidavits failed to establish any nexus between evidence of criminal conduct and Hakel's residence. We do not read the affidavits so narrowly. Zen averred not only that drug traffickers in general create documents recording their illicit transactions, but also that Zen had personal knowledge that Hakel did create such documents. Zen also averred that he personally had participated in an earlier investigation of Hakel during which evidence of criminal conduct was recovered from a

safe house frequented by Hakel and that Hakel had been convicted of possessing cocaine with intent to distribute as a result of that investigation.

The affidavits also established that Hakel went to the motel directly from his residence en route to the site of the second sale and returned to his residence immediately after that sale – a pattern of conduct similar to that adopted by Hakel in connection with his prior illegal conduct. To be sure, Zen's affidavits contained no statements that persons had observed cocaine, paraphernalia, or records of controlled substance transactions in Hakel's residence. *See People v. Leftwich*, No. 93SA290, and *People v. Wade*, No. 93SA291 (Colo. Mar. 7, 1994); *People v. Massey*, 178 Colo. 141, 144, 495 P.2d 1141, 1142 (1972); *People v. Sprowl*, 790 P.2d 848, 850-51 (Colo. App. 1989). However, the link between suspected criminal activity and a specific location to be searched may be established by circumstantial evidence and proper inferences drawn therefrom. *See People v. Higbee*, 802 P.2d 1085, 1089 (Colo. 1990); *People v. Campbell*, 678 P.2d 1035, 1040 (Colo. App. 1983).

Zen's general opinion about the conduct of most drug traffickers may not in itself have been sufficient to establish probable cause to believe records of the two cocaine transactions were located in Hakel's residence. *State v. Mische*, 448 N.W.2d 415, 417-18, 421-22 (N.D. 1989). However, his surmise as an experienced investigator of drug offenses who had participated in a prior investigation of Hakel that the latter probably kept records of the two transactions in his residence was entitled to some consideration. *Bartley*, 817 P.2d at 1033; *Ball*, 639 P.2d at 1082. In our view, common sense inferences from Zen's personal knowledge of Hakel's present and

prior conduct, including the knowledge that on one occasion evidence of Hakel's drug trafficking had been found in a safe house visited by Hakel while traveling to the site of a drug transaction, established probable cause to believe that evidence of the two cocaine transactions witnessed in this case by police and sheriff officials was located in Hakel's residence. The fact that no records of drug-related activities were found in Hakel's residence is not germane to the question of whether Zen's affidavits established probable cause for the issuance of a warrant to conduct the search.

Our conclusion in this case is supported by our decision in *Higbee*, 802 P.2d 1085. In *Higbee*, the defendant, a suspected narcotics dealer, was also suspected of having booby-trapped his automobile with high explosives. The defendant was observed carrying packages from the car into his apartment just prior to his arrest. When a search of the automobile uncovered no explosives, the defendant's apartment was searched, where narcotics were found. We concluded that under all of the circumstances the officers had probable cause to search the apartment and that exigent circumstances were present to excuse their failure to obtain a warrant.

In *Higbee*, the defendant's association with the apartment and the fact that he was seen carrying packages into the building provided the requisite nexus between the suspected illicit items and the location to be searched. We concluded that a reasonable inference could be drawn in those circumstances that the packages contained explosives. In this case, Zen's personal knowledge of Hakel's prior conduct, together with the observations of other officials of Hakel's conduct in connection with the two

cocaine sales, established the nexus between the items to be seized and the place to be searched necessary to support the county court judge's finding of probable cause to issue the warrant for the search of Hakel's residence.

III

For the foregoing reasons, we reverse the judgment of the court of appeals and remand the case to that court with directions to reinstate the judgments of conviction entered against the defendant by the trial court.

JUSTICE LOHR dissents. JUSTICE ERICKSON and JUSTICE SCOTT join in the dissent.

People v. Hakel, No. 92SC103

JUSTICE LOHR dissenting:

The majority concludes that the affidavit upon which the search of Robert Hakel's residence was based was sufficient to establish probable cause to believe that records of Hakel's drug transactions were located at his residence. It therefore reverses the judgment of the court of appeals and remands the case with directions to reinstate the judgment of conviction entered against Hakel by the trial court. Maj. op. at 12. However, while the information in the affidavit may have established probable cause to believe that the records existed, that information contained nothing to establish, beyond the level of mere suspicion, that the records were to be found at Hakel's residence. Therefore, I agree with the court of appeals'

conclusion that the affidavit supporting the search warrant for Hakel's residence failed to show the existence of probable cause. *People v. Hakel*, No. 90CA1966, slip op. at 3 (Colo. App. Nov. 17, 1992) (not selected for publication). Accordingly, I would affirm the judgment of the court of appeals.

The majority adequately presents the facts of the case. Both the United States Constitution and the Colorado Constitution guarantee the right of the people to be secure in their persons against unreasonable searches and seizures by the government. U.S. Const. amends. IV, XIV; Colo. Const. art. II, sec 7. This right is safeguarded by the probable cause standard which is designed to protect citizens from "rash and unreasonable interferences with privacy" yet give "fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). In determining whether an affidavit for a search warrant establishes probable cause, a magistrate must apply a totality-of-the-circumstances analysis. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *People v. Pannebaker*, 714 P.2d 904, 907 (Colo 1986) (adopting the totality-of-the-circumstances test of *Gates* for the purpose of Article II, Section 7, of the Colorado Constitution). The magistrate must determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. A reviewing court must inquire whether the magistrate had a " 'substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). " 'In the case of a search, probable cause means reasonable grounds to believe that [the item sought] is located in the area to be searched.' " *People v.*

Higbee, 802 P.2d 1085, 1089, (1990) (quoting *People v. Melgosa*, 753 P.2d 221, 225 (Colo. 1988)); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is . . . that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.").

In the present case, the affidavit at issue, dated October 12, 1989, incorporated a previous affidavit and provided the following information: Hakel was convicted in 1985 of possession of cocaine and possession of cocaine with intent to distribute; individuals trafficking and distributing controlled substances habitually keep records of their cocaine transactions; in 1984, Hakel kept records of his transactions in cocaine; in 1984, Hakel used a "safe house" to store his cocaine; earlier on October 12, 1989, a warrant had been executed for a search of a motel room used by Hakel; in that search, cocaine was discovered but no records were found.

As a result of this information, the police believed that records of Hakel's drug transactions were located *somewhere*. Nevertheless, even if that belief rose to the level of probable cause, the belief that the records were located *at Hakel's residence* did not rise above the level of mere suspicion. *See People v. Hart*, 718 P.2d 538, 540 (Colo. 1986) (noting that a prime motivation for adoption of the Fourth Amendment was hostility to seizures based on mere suspicion). Nothing in the affidavit established that Hakel previously kept records of his drug transactions at

his residence.[1] The affidavit merely stated that in 1984, Hakel "kept records of his transactions in cocaine." The totality of the facts asserted in the affidavit did not imply that the records were more likely to be found at Hakel's residence than at any other location to which Hakel had access. Therefore, no reasonable grounds existed to believe that the records were located at any particular location and the affidavit thus did not establish probable cause to search Hakel's residence.

Because I agree with the court of appeals' conclusion that the search of Hakel's residence was not supported by probable cause, I would affirm both the court's reversal of the trial court's judgment of conviction and its remand for retrial with instructions that evidence discovered as a result of that search be suppressed. *Hakel,* slip op. at 3, 5-6. Accordingly, I respectfully dissent.

JUSTICE ERICKSON and JUSTICE SCOTT join in this dissent.

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[1] The majority finds similarities in the affidavit between Hakel's movements in 1984 and in the present case. Maj. op. at 9. However, the only similarity between these movements is that in 1984, Hakel went to the safe house prior to making drug sales and in the present case, Hakel visited the motel room before making a drug sale. Referring to the 1984 investigation, the affidavit stated that "on almost every occasion that [investigators] followed Hakel when he was doing a drug sale . . . he went to the safe house prior to making his contact to retrieve the cocaine." The affidavit did not mention Hakel's residence in connection with the 1984 investigation. The mere fact that in the present case Hakel left from and returned to his residence before and after visiting the motel and making the sale did not create probable cause to believe that records would be found at his residence.

APPENDIX B

COLORADO COURT OF APPEALS November 27, 1992
No. 90CA1966 NOT SELECTED FOR PUBLICATION

The People of the State of Colorado,

v. Plaintiff-Appellee,

Robert Joseph Hakel,

Defendant-Appellant.

Appeal from the District Court of Mesa County
Honorable David A. Bottger, Judge
No. 90CR81

Division IV JUDGMENT REVERSED
Opinion by JUDGE TURSI AND CAUSE REMANDED
Metzger and Plank, JJ., concur WITH DIRECTIONS

Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Curt Kriksciun, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

David F. Vela, Colorado State Public Defender, Laurel E. Adams, April Bennett Stone, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Robert Joseph Hakel, appeals from a judgment of conviction finding him guilty of numerous counts involving the possession, distribution, and conspiracy to distribute a controlled substance. We reverse and remand for new trial.

Defendant was one of three individuals arrested in connection with an undercover narcotics operation. One of those individuals, Zane Garner, was contacted by a police informant who inquired about purchasing an ounce of cocaine. A meeting was set up, prior to which the informant was wired with a listening device and given $1200 in marked bills. The meeting took place at Garner's residence on September 22, 1989.

After telling the informant that he needed to contact his "source," Garner made several phone calls in which he discussed arranging a pool game. Garner then took the informant's money and left the house. Police officers conducting surveillance on Garner observed him driving to the parking lot of a nearby convenience store.

During this same time, police observed the defendant, and Charles Stalcup, the third individual arrested in this case, arrive at the same parking lot. Garner left his vehicle and entered the van for a short time. He then returned to his vehicle and drove back to his residence where the informant was waiting. Upon his return, he gave the informant an ounce of cocaine.

A second drug buy was arranged by the informant on October 11, 1989. Garner again made several phone calls and left his house with money provided by the informant. Police observed defendant that same evening. They followed him from his residence to a local restaurant and back to his home where he stayed a short time. He then was followed to a local motel where he entered a room rented to Stalcup and stayed for approximately five minutes. He proceeded to the parking lot of the same convenience store where he had previously met Garner.

Garner arrived shortly thereafter, walked up to defendant's vehicle, and leaned inside the window. Garner returned to his vehicle, went back to his residence, and gave the informant an ounce of cocaine. However, before giving the informant the cocaine, Garner insisted on changing the baggie that contained the contraband so that his finger prints could not be traced.

The police subsequently executed a search warrant at the motel room where they had earlier observed the defendant. Five plastic bags containing approximately twelve ounces of cocaine were discovered in the ceiling of the room. Police arrested defendant the same day as he was about to enter the motel room. A key to the motel room and a portion of the marked money which the informant had given Garner were found on his person. While defendant was in custody, the police obtained a warrant to search his residence and executed it. They did not find any cocaine, paraphernalia, or records, but they did locate approximately $40,000 in cash.

I.

Defendant first argues that there was no probable cause to search his residence. He further contends that the admission of the fruit of that search, *i.e.*, the $40,000 in cash, resulted in prejudicial error. We agree.

Probable cause for a search warrant exists when the affidavit in support of the warrant alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or other evidence of criminal activity is

located at the place to be searched. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *People v. Arellano*, 791 P.2d 1135 (Colo. 1990).

The decision to issue a warrant must be predicated on the practical and common sense determination of whether, given all of the grounds asserted in the affidavit, there is a fair probability that seizable objects will be found in the place to be searched. *People v. Rayford*, 725 P.2d 1142 (Colo. 1986). The duty of a reviewing court is simply to ensure that a substantial basis existed for the finding of probable cause. *People v. Arellano*, supra.

Here, the affidavit supporting the search warrant for defendant's residence failed to show the existence of probable cause. The affidavit incorporated the prior affidavit that was given in support of the warrant to search the motel room. The prior affidavit detailed the surveillance done on defendant and also reported defendant's prior involvement in the trafficking of drugs including his modus operandi of a "safe house" to store narcotics.

The latter affidavit described the search of the motel room and the resulting discovery of the cocaine in the ceiling. The only other fact included in the latter affidavit was that there were no records or other paperwork of the type normally associated with drug trafficking discovered during the search of the motel room.

These facts did not provide any indication that contraband, related paraphernalia, or records were likely to be located at defendant's residence. The absence of a nexus linking the presence of these items to defendant's residence rendered the affidavit inadequate. *See People v. Arnold*, 181 Colo. 432, 509 P.2d 1248 (1973) (no probable

cause where affidavit failed to indicate which specific apartment in a multi-occupancy structure, drugs would be located.); *People v. Massey*, 178 Colo. 141, 495 P.2d 1141 (1972) (affidavit inadequate where informant was present when defendant sold drugs, but failed to state that she was ever in defendant's residence or that she saw drugs or the sale of drugs in defendant's residence); *People v. Sprowl*, 790 P.2d 848 (Colo. App. 1989) (facts indicating defendant had been involved in drug transactions at other locations, that police had intercepted a phone call in which a drug dealer stated he had delivered "things" to defendant, and that prior to defendant's arrest, he closed a door behind him in an apparent effort to conceal something, were insufficient to support a search warrant for his home.).

The People rely on *People v. Higbee*, 802 P.2d 1085 (Colo. 1990) to argue that probable cause for the search of defendant's apartment did exist. In *Higbee*, an informant reported to the police that defendant's vehicle was wired to a bomb. The police executed a search of the vehicle, but did not find the suspected bomb. They executed a subsequent search of defendant's apartment where they found other contraband. In finding the search legal, our supreme court noted that defendant's association with the apartment combined with the observation of items being carried from defendant's vehicle to his apartment led to the reasonable conclusion that the bomb had been moved to the apartment.

Thus, contrary to the People's representation, the finding of probable cause in *Higbee* was not solely based on the absence of the bomb in the defendant's car. Rather, the observation that defendant had moved several items

from his vehicle to his apartment provided the necessary link to defendant's residence. As already explained, such a nexus was not alleged in the affidavits at issue here.

We also agree that the admission of the large amount of cash found in defendant's apartment was highly suggestive of his involvement in the sale and distribution of narcotics. *See People v. Bustam*, 641 P.2d 968 (Colo. 1982). Consequently, we cannot say with fair assurance, under the totality of the evidence, that error was harmless. Thus, reversal is required, and any evidence of concerning the money found in defendant's house must be suppressed on retrial.

II.

Among the issues which may arise on retrial, is defendant's challenge to the legality of the search of the motel room. Defendant argues that the search was defective because the police conducted a warrantless dog sniff of the outside walkway prior to obtaining a search warrant for the motel room.

While we disagree with this contention, *see People v. Wieser*, 796 P.2d 982 (Colo. 1990), it is without significance since the trial court properly determined the validity of warrant without reference to the necessity of a warrant for the dog sniff procedure. *People v. Inman*, 765 P.2d 577 (Colo. 1988) (Appellate review of a suppression issue is normally limited to the legal basis set forth in the court's ruling.)

III.

Defendant also contends that the admission of extrinsic evidence concerning a prior out-of-court statement by Garner violated both CRE 613 and his constitutional right to confrontation. We disagree that the admission of the complained of evidence resulted in any error.

At trial, Garner testified that he did not know what the term "middling" meant and that he did not recall ever acknowledging to one of the investigating police officers that he "middled" for the defendant. The People then called the investigating officer who testified that when he arrested Garner, he had informed him that there was an independent arrest warrant out based on Garner's "middling cocaine for" the defendant. The officer further testified that Garner responded by stating that that was all he did for the defendant.

Defendant argues that because Garner did not use the term "middling" in his exchange with the police officer, there was no inconsistency that would have allowed the admission of the officer's testimony under CRE 613. We disagree.

Pursuant to CRE 613, extrinsic evidence of a prior out-of-court statement may be introduced if a witness denies or fails to remember making the statement. As explained in 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 613[02] at 613-13 to 613-14 (1992): "Any statement is inconsistent if under any rational theory it might lead to any relevant conclusion different from any other relevant conclusion resulting from anything the witness said."

Here, Garner' statement to the officer suggested that he knew what the term "middling" meant. Therefore, an inconsistency did exist and Garner's claimed ignorance regarding the word "middling" combined with his lack of recall concerning his statement to the officer provided the foundation required for admission under the prior inconsistent statement provision of CRE 613. *People v. Baca*, 633 P.2d 528 (Colo. App. 1981).

Furthermore, inasmuch as Garner did appear at trial and was available to be questioned concerning his statement to the officer, we conclude that his lack of recall did not result in a violation of defendant's right to confrontation. *People v. Pepper*, 193 Colo. 505, 568 P.2d 446 (1977). *See also* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 801(d)(1)(A)[07], at 801-163 to 801-164 (1992).

Defendant argues that *People v. Pepper, supra*, is not dispositive of the confrontation issue because it was decided prior to the adoption of the Colorado Rules of Evidence. We note, however, that CRE 613 accords with prior Colorado case law. *Montoya v. People*, 740 P.2d 992 (Colo. 1987).

Moreover, in light of our determination that the prior statement was admissible under CRE 613, we reject defendant's assertion that the definition of unavailability set forth in CRE 804 should control our analysis of the confrontation question. *See People v. Bowers*, 801 P.2d 511 (Colo. 1990) (CRE 804 is a residuary rule and applies only if "hearsay" is not otherwise admissible.).

We also reject defendant's contention that a limiting instruction was necessary. Here, the evidence in question

was admissible both for impeachment purposes and substantive purposes. *See* 16-10-201, C.R.S. (1986 Repl. Vol. 8A); *People v. District Court,* 195 Colo. 570, 580 P.2d 388 (1978).

Accordingly, under a similar evidentiary posture, the challenged testimony of the officer will again be admissible on retrial.

IV.

Defendant further claims that the trial court erred when it allowed various out-of-court statements by Garner to be introduced under the co-conspirator's exception set forth in CRE 801(d)(2)(E). He also contends that the admission of those statements violated his right to confrontation. Again, we disagree.

CRE 801(d)(2)(E) allows "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy to be admitted." *People v. Esch,* 786 P.2d 462 (Colo. App. 1989) Before such statements may be admitted, however, the People must establish by a preponderance of the evidence that the defendant and the declarant were members of a conspiracy and that the declarant's statement was made during the course and in furtherance of the conspiracy. *People v. Montoya,* 753 P.2d 729 (Colo. 1988); *People v. Esch, supra.*

While an alleged co-conspirator's statement may properly be considered in resolving the issue of admissibility, there must also be some independent and corroborative evidence. And, this corroborating evidence may take many forms including circumstantial evidence of the

conspiracy. *People v. Montoya, supra; People v. Taylor*, 804 P.2d 196 (Colo. App. 1990).

A fact is established by a preponderance of the evidence when upon consideration of all the evidence, the existence of that fact is more probable than its nonexistence. *People v. Garner*, 806 P.2d 366 (Colo. 1991).

The statements referred to here related to several conversations overheard by the informant in which Garner talked about setting up a pool game. These conversations occurred after Garner allegedly told the informant that he needed to contact his "source." There was additional testimony by one of the investigating officers that it is common for a code to be used when a drug transaction is being arranged. The officers conducting the surveillance also testified that after the conversations, Garner left and met with the defendant and then returned to his residence and gave the informant the cocaine.

This evidence Garner's "middling" statement, the observation of defendant at the motel room as well as his meetings with Garner, the informant's testimony that Garner changed the baggie containing the cocaine, the discovery of the cocaine in the motel room, and finally, the fact that defendant had a key to the motel room and a portion of the marked money when he was arrested combine to form more than an adequate basis to satisfy the preliminary showing required under the coconspirator exception. *See People v. Vandiver*, 191 Colo. 263, 552 P.2d 6 (1976).

We also conclude that, because Garner was produced for cross-examination concerning his statements, defendant's right to confrontation was not abridged. *People v.*

Oliver, 745 P.2d 222 (Colo. 1987) (a defendant's right of confrontation is satisfied if the hearsay declarant is produced for cross-examination); *People v. Hise,* 738 P.2d 13 (Colo. App. 1986) (defendant exercised his right to confrontation where witness was cross-examined).

Defendant accurately argues that Colorado has yet to adopt a per se rule that satisfaction of the criteria of CRE 801(d)(2)(E) also satisfies a defendant's right to confrontation. *See Nunez v. People,* 737 P.2d 422 (Colo. 1987) and *People v. Taylor, supra.* However, the question of whether Garner's lack of recall rendered him unavailable thereby implicating defendant's right to confrontation is irrelevant here because the corroborative evidence adduced at trial was more than sufficient to provide the necessary showing of reliability required under the rule set forth in *People v. Dement,* 661 P.2d 675 (Colo. 1983).

Finally, we reject defendant's contention that the probative value of the hearsay statements was outweighed by their prejudicial effect. *See People v. Esch, supra.*

Hence, again under a similar evidentiary posture, this evidence will be admissible on retrial.

V.

Defendant correctly asserts that his conviction for possession of cocaine with intent to distribute on October 12, 1989, (count one) and simple possession of cocaine on the same date (count two) violated his double jeopardy rights because the second count was a lesser included offense of the first. *People v. Brown,* 185 Colo. 272, 523 P.2d 986 (1974). Thus, if defendant is found guilty of both

counts on retrial, only a conviction on count one may be entered. *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

We disagree, however, that the guarantee of double jeopardy was in any way restricted by the charging of two separate counts of conspiracy. The evidence contained in the record is adequate to a support a finding by the jury that two conspiracies, one on September 27th, and one on October 11th, occurred.

VI.

Defendant also attacks the sufficiency of the evidence supporting all but two of the counts. Viewing the record in a light most favorable to the People, as we must, we are satisfied that the admissible evidence, albeit not overwhelming, was adequate to support defendant's convictions. *See People v. Beyer*, 768 P.2d 746 (Colo. App. 1988).

VII.

Finally, defendant argues that the trial court erred when it imposed sentences within the aggravated range set forth in § 18-1-105(9), C.R.S. (1988 Repl. Vol. 8B), as it then applied. We perceive no error.

Section 18-1-105(9) requires aggravation of a sentence when an accused commits a felony while on probation for another felony. Here, the crimes for which defendant was convicted are proscribed by § 18-18-105, C.R.S. (1986 Repl. Vol. 8B). Section 18-18-105(2), C.R.S. (1986 Repl. Vol. 8B) requires the enhancement of a class three felony to a

class two if the narcotics offense was committed subsequent to a prior narcotics conviction. Defendant maintains that the sentencing scheme contained in § 18-18-105 is complete and, therefore, precluded application of § 18-1-105(9).

Our review of § 18-18-105, however, reveals nothing to indicate that it is to be applied exclusively or that it conflicts with § 18-1-105(9). Therefore, we reject this contention. *See In re M.S. v. People*, 812 P.2d 632 (Colo. 1991) (when several statutes concern the same subject matter, court attempts to read them together and reconcile them, if possible, to give effect to each statute.)

The judgment is reversed and the cause is remanded for a new trial consistent with the views expressed herein.

JUDGE METZGER and JUDGE PLANK concur.

APPENDIX C

STATE OF COLORADO

COURT OF APPEALS

2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals No. 90CA1966
Trial Court No. 90CR81

THE PEOPLE OF THE STATE OF COLORADO V JOSEPH HAKEL

THIS CAUSE came to be heard on the record on appeal from the District Court for Mesa County, State of Colorado, was argued by counsel, opinion issued and judgment entered. Petition for certiorari was applied for and granted in the Colorado Supreme Court. An opinion was announced by the Supreme Court on March 14, 1994, wherein the judgment of the Colorado Court of Appeals was REVERSED AND CASE REMANDED WITH DIRECTIONS.

WHEREFORE IT IS ORDERED, that the judgment of the District court for Mesa County is AFFIRMED. The cause is remanded to that Court for further proceedings in conformance with the opinion of the Supreme Court. Copies of the opinions of the Supreme Court and the Court of Appeals are attached.

WITNESS, the HONORABLE ALAN L. STERNBERG, Chief Judge of the Colorado Court of Appeals and the Seal thereof, affixed this 29th day of April, 1994.

PATRICK STANFORD
Clerk of the Court

By: /s/ Catherine Cunningham
Deputy Court Clerk

APPENDIX D

COUNTY COURT, MESA COUNTY, COLORADO

Criminal Action No. 89 F

AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT FOR 2150 COLLEGE PLACE, APARTMENT NUMBER 22 WHICH IS AN APARTMENT LOCATED IN A COMPLEX OF BUILDINGS THAT ARE TAN AND BROWN IN COLOR, TWO-STORY MULTI-RESIDENTIAL LOCATED IN GRAND JUNCTION, MESA COUNTY, COLORADO, APARTMENT 22 BEING A TWO-STORY APARTMENT IN THE MIDDLE OF THE COMPLEX.

COMES NOW John Zen, being of lawful age and first duly sworn upon his oath and states and alleges in support of this affidavit as follows:

1. I am duly employed as a police officer with the Grand Junction Police Department currently assigned as an Investigator with the Mesa County Narcotics Enforcement Team (comprising of officers from the Grand Junction Police Department and the Mesa County Sheriff's Office) and was so employed at all times relevant to this affidavit. The information contained in this affidavit was compiled by me in the course of a criminal investigation by speaking to fellow law enforcement officers and reliable citizen informants. All locations referred to are in Mesa County, Colorado, unless specifically noted otherwise.

2. In the early morning hours of October 12, 1989 your Affiant and other members of the Mesa County

Narcotics Enforcement Team executed a search warrant signed by the Honorable Judge Arthur Smith on Room 271 at the Best Value Inn located at 718 Horizon Drive, Grant Junction, Mesa County, Colorado. That search warrant was issued based on an Affidavit filed by your Affiant (Exhibit A) which is incorporated by reference herein. As a result of that search warrant, approximately 14 ounces of a white powdery substance which later was confirmed to be cocaine was removed from the location of Room 271 of the Best Value Inn.

3. Based on the observations that were made and contained in the attached Affidavit, (Exhibit A), it is clear to your Affiant from his training and experience that Robert Hakel is substantially involved in the trafficking of cocaine. I also know through my training and experience that individuals trafficking and distributing controlled substances habitually keep records and other written documents concerning the amount of cocaine in which they sell and the prices paid for it. At approximately 10:00 p.m. Robert Hakel was contacted by Deputies William Booth and Steven Stogsdill of the Mesa County Narcotics Enforcement Team at Room 271 of the Best Value Inn. Hakel was contacted in the process of inserting a key to Room 271 into the door. As he did so and attempted to leave, he was contacted by the Deuputies [sic] Stogsdill and Booth. The key to Room 271 was found in his possession at that time. Your affiant would state from his training and experience that since no records or paperwork having to do with the sale or transactions of cocaine was found in Room 271 where the cocaine was located and that during the prior wiretap investigation in 1984, your affiant has personal knowledge that Mr. Hakel

kept records of his transactions in cocaine. There is probable cause to believe that such records and paperwork associated with the purchase and distribution of controlled substances, to wit: cocaine would be located at his residence (at 2150 College Place, Apt. 22, Grand Junction, Mesa County, Colorado, where a check with Public Service records indicates the utilities are provided by Robert Hakel). Such records then would be of material use in the subsequent investigation and prosecution of Mr. Hakel and others of the possession and intent to distribute the cocaine which was found in Room 271 of the Best Value Inn. I have observed Robert Hakel residing in apartment #22 College Place [(JAZ)].

Therefore, there is probable cause to believe that within the residence at 2150 College Place, Apt. 22, Grand Junction, Colorado, which to your affiant's observation is a tan and brown two-story multi-resident complex with Apt. 22 being a two-story apartment in the middle of the complex, there is evidence of distribution of cocaine in violation of Section 18-18-105, C.R.S., as amended, and that a warrant to search said premises for cocaine, paraphernalia commonly used for the ingestion of cocaine and for the packaging, distribution and the sale of cocaine and all documentation, letters, bills and papers reflecting the residency, rental or ownership of said premises, said controlled substances, any cash and other monies associated with the sale or purchase of cocaine, documents and records reflecting the sale and use of cocaine.

/s/ John A. Zen
John Zen

STATE OF COLORADO)
)
COUNTY OF MESA) ss.

The foregoing was subscribed and sworn to before me this 12th day of October, 1989, by John Zen.

/s/ David McKinley
COUNTY COURT JUDGE

EXHIBIT A

COUNTY COURT, MESA COUNTY, COLORADO

Criminal Action No. 89 F

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT FOR ROOM 271 OF THE BEST VALUE INN LOCATED AT 718 HORIZON DRIVE WHICH IS A RED TWO-STORY MULTI-UNIT BUILDING WITH WITH [sic] WHITE TRIM WITH ROOM 271 BEING LOCATED ON THE SECOND FLOOR OF THE BUILDING WITH THE NUMBERS 271 ON THE DOOR, GRAND JUNCTION, MESA COUNTY, COLORADO

COMES NOW John Zen, being of lawful age and first duly sworn upon his oath and states and alleges in support of this affidavit as follows:

1. I am a duly employed as a police officer with the Grand Junction Police Department currently assigned as

an Investigator with the Mesa County Narcotics Enforcement Team (comprising of officers from the Grand Junction Police Department and the Mesa County Sheriff's Office) and was so employed at all times relevant to this affidavit. The information contained in this affidavit was compiled by me in the course of a criminal investigation by speaking to fellow law enforcement officers and reliable citizen informants. All locations referred to are in Mesa County, Colorado, unless specifically noted otherwise.

2. I have been employed as a narcotics officer for the Mesa County Narcotics Enforcement Team for the past four years. Mesa County Narcotics Enforcement Team is a law enforcement unit comprised of two investigators from the Mesa County Sheriff's Department and two investigators from the Grand Junction Police Department whose primary task is to investigate narcotics violations. My training has included a basic narcotics investigation course taught by the Drug Enforcement Administration, a two week course in link analysis which involved instructions on putting together complex investigations, three courses sponsored by the National Intelligence Academy on Narcotics Investigation and Surveillance. I also teach narcotics investigation and surveillance to officers from all over the state of Colorado.

3. On October 3, 1989 at approximately 3:30 p.m. I observed a person known to me through prior contacts and surveillance as Robert Hakel pull into the parking lot of Jack's Place which is a nightclub located at 509 28½ Road, Grand Junction, Mesa County, Colorado. I observed Hakel to park his car in an area of the parking lot that was away from the building and away from

where other cars had parked. I then observed an unidentified white male subject get into the passenger side of the car that Hakel was driving. Approximately 9 minutes later the unidentified white male got out of Hakel's car and Hakel left the parking lot northbound on 28½ Road. I then observed a white male subject to leave the parking lot immediately after Hakel left the parking lot. This white male subject looked to be the same person who had met with Hakel. This subject was driving a blue car with a Colorado passenger plate UJA257. I then checked with the Colorado Department of Motor Vehicles for a registration for a Colorado passenger plate UJA257. This license plate was registered to Galen Clutter.

4. On October 11, 1989 Detective Bill Booth who is a duly employed law enforcement officer with the Mesa County Sheriff's Department and Detective Tim Grimsby who is a duly employed law enforcement officer with the Grand Junction Police Department were surveilling 2150 College Place, number 22. Booth and Grimsby both indicated to me that approximately 8:05 p.m. they observed Robert Hakel to leave that residence. Hakel was driving a 1975 four-door Oldsmobile, beige in color with Colorado passenger plate (UHB012). Booth and Grimsby stated that they followed Hakel in his vehicle to the Best Value Inn located at 716 Horizon Drive in Grand Junction, Mesa County, Colorado. Booth stated that he then observed Robert Hakel to go into room 271 of the Best Value Inn. Booth stated that when Hakel started to enter the room that he appeared to be looking around in the parking lot and outer area of the building as if he were looking to see if anyone were watching. Booth stated that he saw Hakel go into the room and leave the door open. Hakel turned

on a light in the room and then came back to the door and again looked around as if to determine whether anyone were watching. Hakel then closed the door. Approximately five minutes later Booth stated that Hakel left room 271. Detective Grimsby told me that he then followed Hakel from the Best Value Inn to the Loco Food Store located at 29 Road and Patterson Road in Grand Junction, Mesa County, Colorado. Grimsby stated that he observed Hakel to meet with a person who Grimsby knew as Zane Garner. Grimsby stated that Garner walked up to the driver's window of Hakel's car, stayed there for approximately four minutes and then left. Grimsby stated that Hakel also left the area at that time and he followed Hakel back to the residence at 2150 College Place, Number 22. Grimsby observed Hakel to go into that residence.

5. In the latter part of 1984, I personally participated in a Federal Bureau of Investigation wiretap investigation in Mesa County, Colorado. Robert Hakel was the target of that wiretap. I know that as a result of that investigation Robert Hakel was indicted by a Federal Grand Jury for possession of cocaine and possession of cocaine with intent to distribute.

6. On October 11, 1989 I spoke with Max Marr who is a now retired agent from the Federal Bureau of Investigation. I have personal knowledge that Marr was the lead investigator on the wiretap investigation targeting Robert Hakel in 1984. Marr stated to me that Hakel was convicted in 1985 of possession of cocaine and possession of cocaine with intent to distribute. I also spoke with Dan Penray who is a federal parole officer in Mesa County, Colorado. Penray's address is the Federal Building, 4th &

Rood Avenue, Grand Junction, Mesa County, Colorado. Penray confirmed to me on October 11, 1989 that Robert Hakel is currently on federal parole and probation for his drug convictions. Max Marr further stated to me that during the investigation against Robert Hakel in 1984 it was revealed through surveillance that Robert Hakel used what is called a safe house to store his cocaine. The safe house was a condominium located on West Indian Creek Road. Marr further stated that on almost every occasion that they followed Hakel when he was doing a drug sale that he went to the safe house prior to making his contact to retrieve the cocaine. I also know through my involvement during that investigation that during the search of the condominium on Indian Creek Road that over one pound of cocaine was found in the ceiling by Officer Greg Assenmacher, who was and is a law enforcement officer with the Grand Junction Police Department.

7. I have reviewed records at the Mesa County District Attorney's Office and I am aware that in 1985 Gaylord Clutter was convicted of two counts of possession of cocaine. Max Marr also told me on October 11, 1989 that during the wiretap investigation against Robert Hakel in 1984 that he heard conversations on the wire where Robert Hakel referred to Galen Clutter and his cocaine trafficking business.

8. Investigator Tim Grimsby who owns a narcotics detection canine named Duke has stated to me that he attended a course given by Jessie Lewis who is a national judge and instructor in a three week course in narcotics canines for the detection of cocaine, methamphetamine, marijuana, and marijuana concentrate. Detective Grimsby stated that he and Duke were certified proficient in the

detection of cocaine, methamphetamine, marijuana, and marijuana concentrate. Duke has been correct in at least 15 out of 16 encounters with detection of the above listed drugs. On October 11, 1989 at approximately 10:15 p.m. Detective Grimsby took his narcotics detection canine Duke to the Best Value Inn located at 718 Horizon Drive. Grimsby stated that he walked Duke past all of the doors on the second floor of the Best Value Inn. When Duke got to room 271 he indicated that he detected the odor of narcotics from the room by jumping on the door and scratching.

9. Cocaine is a scheduled II controlled substance as indicated by Section 12-22-310 C.R.S., as amended and also a violation of 18-18-105 C.R.S., as amended.

Wherefore, there is probable cause to believe that within Motel Room number 271 at the Best Value Inn located at 718 Horizon Drive in Grand Junction, Mesa County, Colorado there are quantities of cocaine the possession of which is illegal in the state of Colorado and it is therefore respectfully requested that a warrant be issued to search said premises for the following: cocaine, paraphernalia, commonly used for the ingestion of cocaine and for the packaging and distribution by sale of cocaine and all documentation, letters, bills and papers reflecting the residency, rental or ownership of said premises and of said controlled substances, cash and other monies associated with the sale and purchase of cocaine and documents and records reflecting the sale and purchase of cocaine.

STATE OF COLORADO)
)
COUNTY OF MESA) ss. /s/ John A. Zen

The foregoing was subscribed and sworn to before me this 12 day of October, 1989, by John Zen.

/s/ Illegible
COUNTY COURT JUDGE